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Court of Appeal - Second Dist.
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Joseph A. Lane, Clerk
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION FOUR

THE PEOPLE,	B118869
Plaintiff and Respondent,	(Super. Ct. No. LA026210)
v.	
SHIRLEY REE SMITH,	
Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Affirmed as modified.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Marc J. Nolan and Peggie J. Bradford, Deputy Attorneys General, for Plaintiff and Respondent.

Shirley Rec Smith appeals from her judgment of conviction by jury trial of assault on a child causing death (Pen. Code, § 273ab). [1] She challenges the sufficiency of the evidence to establish the cause of the infant's death and that she had the custody and control of the child at the time of the crime. She argues that the trial court deprived her of a fair trial by repeated disparaging comments about her trial attorney and that the trial court showed favoritism toward the prosecution. She also contends that the trial court made improper comments about the expert witnesses, disparaging the defense experts and favoring the prosecution experts. The Attorney General argues that the judgment must be modified to impose a parole revocation fine under section 1202.45.

We conclude that the verdict is supported by substantial evidence, and that the comments of the trial court do not constitute a basis for reversal. We modify the judgment to impose the parole revocation fine, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

Appellant is the grandmother of Etzel, the infant victim in this case. At the time of Etzel's death, appellant shared an apartment with her brother, Stephen Keys; her daughter, Tomeka Smith;[2] and Tomeka's children, Yondale, Yolanda, and Etzel. Every day, appellant helped Tomeka care for Yondale, Yolanda

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1. All statutory references are to the Penal Code unless otherwise indicated.

2. We refer to Ms. Tomeka Smith as "Tomeka" to avoid confusion with her mother.

and Etzel. At times, appellant, Tomeka, and Tomeka's children stayed with appellant's sister, Renee Townsend. Ms. Townsend had two children, Marcus and Marcellus.

Etzel was born on November 10, 1996 with jaundice and a heart murmur. Both conditions resolved before his death. On November 29, 1996, appellant, Etzel, Yondale, and Yolanda spent the day at Ms. Townsend's apartment. Etzel seemed normal that day, eating well, smiling, moving his arms and legs, and having normal urination and bowel movements. That night, at the Townsend apartment, Tomeka put Etzel to sleep on his stomach on the sofa in the living room after feeding, changing and washing him. Yondale also slept on the sofa. Yolanda slept on a love seat in the same room. Appellant slept on the floor near the sofa. Ms. Townsend left for work when Tomeka put Etzel down to sleep. Marcus and Marcellus slept in their bedroom.

Usually, when staying at the Townsend apartment, Tomeka also slept in the living room. But on the night of November 29, 1996, she went into Ms. Townsend's room to listen to music and fell asleep. Etzel was fine as of 11:30 p.m. when Tomeka put him down to sleep.

In the early morning hours of November 30, 1996, appellant rushed into the bedroom holding Etzel and wakened Tomeka. Etzel was limp and appeared to have vomit coming from his nose. Appellant said: "Tomeka, Tomeka. Something is wrong with Etzel. . . . [C]all 911." Appellant handed the baby to Tomeka and Tomeka called 911.

Firefighters received the call and responded to the

apartment, arriving at 3:36 a.m. Etzel was clothed, lay on the bedroom bed, and had bright red blood in one nostril. He was warm, but was not breathing and his heart was not beating. The firefighters began cardiopulmonary resuscitation and other efforts to revive the baby, without success. An ambulance arrived to transport Etzel to the hospital. Shortly after he arrived at the hospital, Etzel was declared dead.

When an infant dies without obvious signs of trauma, it is standard procedure to declare the death as a Sudden Baby Death Syndrome (SIDS) case, pending autopsy. (We reserve the specific details of the autopsy results for our discussion of appellant's challenge to the sufficiency of the evidence.) After the autopsy was completed, the coroner concluded that the cause of death was not SIDS, but shaken baby syndrome.

On December 5, 1996, a social worker, Linda Reusser, went to the Townsend apartment and told Tomeka and appellant that the cause of death had been changed to shaken baby syndrome. Ms. Reusser asked what had happened. Appellant told her that Yondale had wakened about 3:20 on the morning of November 30, and that she had gone to comfort him. She went over to Etzel and saw he was face down. She touched him and he did not respond. Worried, she picked him up and gave him "a little shake, a jostle" to waken him. Etzel's head was flopped back when she picked him up. He did not respond. Appellant demonstrated for Ms. Reusser that she had picked Etzel up under the armpits with her hands even with her shoulders, and gave him what Ms. Reusser described as "a quick jostle" which was a smooth rather than a jerky motion. At that point, appellant stopped talking.

Ms. Reusser said: "Shirley, what happened next?" Appellant said something like: "'Oh, my God. Did I do it? Did I do it? Oh, my God.'" Ms. Reusser told Tomeka that she was going to remove Yondale and Yolanda from the home while an investigation was conducted.

Los Angeles police officers interviewed appellant on December 9, 1996. She said that Etzel was fine at 11:30 on the night of November 29th. Yolanda fell onto appellant and woke her. Appellant noticed that Etzel needed to be changed, and when she picked him up, his head flopped back and he had vomit around his mouth. At first, appellant said she shook Etzel, and then corrected herself and said that she had twisted the baby to try to elicit a response from him. She said that she shook Etzel for "just a matter of a few seconds." Tomeka told Detective Nancy Nelson that appellant had said that Etzel had fallen earlier in the evening, was fine, and was put back to sleep on the couch.

Appellant was arrested and charged with one count of assault on a child causing death (§ 273ab). At trial, both the prosecution and the defense presented the testimony of medical experts regarding the cause of Etzel's death. We review that testimony in detail in our discussion of appellant's challenge to the sufficiency of the evidence. Appellant was convicted as charged. She was sentenced to a term of 15 years to life in prison. She filed a timely appeal.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to support her conviction. The standard of appellate

review is well established. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People* v. *Bolin* (1998) 18 Cal.4th 297, 331.)

A

Appellant's first challenge is to the evidence of the cause of Etzel's death. She contends the evidence was not sufficient to establish that he died from shaken baby syndrome. She relies heavily upon various medical publications regarding shaken baby syndrome, which she concedes were not presented in evidence at trial. We decline to consider matters outside the record of the trial. (See *People* v. *Peevy* (1998) 17 Cal.4th 1184, 1207 ["[T]he general rule [is] that an appellate court generally is not the forum in which to develop an additional factual record, particularly in criminal cases when a jury trial has not been waived."].)

Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner, testified at trial that Etzel did not die from SIDS. He died from trauma. Dr. Carpenter explained that if death is from SIDS, there are no bruises, abrasions, or signs of internal trauma.

The autopsy revealed that Etzel had blood on the top of his brain, an abrasion on the lower left back of the head, and a bruise underneath the abrasion. The bruise

was relatively small, and was not sufficient in itself to explain the cause of death. There was also a small amount of blood between the two halves of the brain. In addition there was a small amount of blood in the posterior fossa (at the base of the skull). There was also older blood which may have been a sign of an older injury which occurred days or weeks prior to death. There was no indication of heart or liver disease.

The autopsy also revealed hemorrhages of the optic nerves on both sides of the brain. The hemorrhages were recent. There was also subarachnoid and subdural hemorrhaging at the bottom of the brain. Dr. Carpenter explained that the dura is the thick covering of the brain and that the subarachnoid is a very thin cellophane-like covering of the brain itself.

Dr. Carpenter testified that the bleeding on top of Etzel's brain was caused by violent shaking so "there was a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore. [¶] And bleeding started at the top right part of the brain. And also the brain was so damaged from this violent shaking that death occurred relatively quickly, within . . . 30 minutes. [¶] But there was no significant delay between the shaking and the brain damage. The bleeding was not much. [¶] There are two ways that . . . shaking to the head can cause death. One way is that the shaking itself is so severe that the brain tears in vital areas that control the heartbeat and the breathing. [¶] And then the bleeding can be small and won't amount to that much. [¶] The other way that a baby's body can die from shaking or from head trauma is for the vessels to

tear, but for the brain not to be damaged that much. And for the blood to accumulate on top of the head. [¶] There is not enough room in the skull for the brain and the blood. So the brain is pressed downward into the spinal canal and is crushed and that dies."

Dr. Carpenter explained that in Etzel's case there was not enough blood to press the brain downward, and that death therefore was a result of direct trauma to vital areas of the brain before there was enough accumulation of blood to cause death from pressure on the brain. Dr. Carpenter said that he could not rule out the possibility of other blows to the head, but that there was no clear evidence of such blows except for the one small area of bruising. He testified that a fall from the sofa in the Townsend apartment could not account for the injuries to Etzel's head. He also said that the injuries could not have been caused by the administration of CPR. Dr. Carpenter testified that during the last moments of life in an infant there would be a release of feces and regurgitation of stomach contents. The jury was shown a diagram (People's Exh. 12) portraying a whiplash shake injury syndrome in an infant.

Dr. Carpenter testified that retinal hemorrhages are often seen in the bodies of infants who are the victims of shaken baby syndrome. There were no retinal hemorrhages in Etzel's eyes. There was evidence of old bleeding in the optic nerve on the right side of the brain.

On cross-examination, defense counsel established that Dr. Carpenter's trial testimony was inconsistent with his testimony at the preliminary hearing regarding whether he was present for the entire autopsy of Etzel, which was performed by Dr. Stephanie Erlich. Dr.

Carpenter also testified on cross-examination that fractures are common in babies who have been shaken, but there were no fractures on Etzel. Dr. Carpenter said that subdural or subarachnoid hemorrhage could manifest in babies that suffer birth trauma. He also said that such injuries could result from a fall in which the baby strikes its head against an object.

Dr. Erlich, the autopsy surgeon, also testified. At the time she conducted the autopsy on Etzel, she was an associate deputy medical examiner. She was doing a one-year fellowship in forensic pathology to obtain board certification in that field. She was board certified as a neuropathologist and in anatomic pathology. She was certified as a clinical pathologist in 1996.

Dr. Erlich corroborated Dr. Carpenter's testimony about the autopsy findings on Etzel. She added that bilateral plural petechia were found in the lining around the lung. She explained that the subdural hemorrhages were found in the back of the head, the occipital area, and in the bottom of the skull. There was subarachnoid hemorrhaging in the occipital areas, in both frontal areas, in the right parietal area, and on the left temporal lobe.

Dr. Erlich and Dr. Hidelo Itabashi performed a neuropathological examination on Etzel's brain. They confirmed the presence of fresh subarachnoid hemorrhages in the parietal areas, the occipital areas, the frontal areas, and in the left temporal area. They also confirmed the presence of fresh subdural hemorrhage in the parietal area, as well as an older subdural hemorrhage in the right parietal area. Dr. Erlich testified that the cause of death was trauma to

the brain. On cross-examination, Dr. Erlich testified that this was her first autopsy on a victim of shaken baby syndrome. She said that the fresh blood found on Etzel's brain could not be the result of rebleeding from an earlier trauma. Dr. Erlich notified the police of the autopsy findings. On redirect, Dr. Erlich testified that the injuries to Etzel's brain could not have occurred as the result of shaking after death.

The defense presented testimony that neither of the firefighters who came to the apartment nor the investigator for the coroner saw trauma on Etzel's body. Rene Townsend testified that appellant only corrects the children verbally, does not have a temper, and that on the night of Etzel's death, everyone was in a festive Thanksgiving mood. She said that the social worker, Ms. Reusser, accused appellant of causing Etzel's death.

Dr. Richard Siegler testified that Etzel died from brain trauma, but that it was not the result of shaken baby syndrome because there was no retinal hemorrhaging. He disagreed with Dr. Carpenter and Dr. Erlich that death was the result of direct damage to the brain. Dr. Siegler testified that the brain trauma was not something that happened just a few hours before death. He said there was no fresh trauma. He also testified that old bleeding tends to draw in new bleeding.

On voir dire, the prosecutor established that Dr. Siegler's extensive experience was not in forensic pathology, but in general, clinical and anatomic pathology. Ninety-five percent of his publications have been on cancer. He had not authored any articles dealing with child abuse or forensic pathology in

determining the causes of death in infants. Although he had been a medical examiner in Philadelphia in 1960, shaken baby syndrome was unknown at that time. He had not been involved in any autopsies where the cause of death was found to be shaken infant syndrome. He had performed 50 autopsies on children with brain trauma over the last 25 years.

On cross-examination, Dr. Siegler said that he did not believe the cause of death was SIDS. After discussing an article on which Dr. Siegler had relied in his report for the defense, the prosecutor referred to a particular passage and asked: "So you would agree, then, Doctor, that just because there are no retinal hemorrhages that does not exclude that it is a shaken baby. Would you agree with that?" Dr. Siegler answered: "That's correct." He went on to say that you can diagnose shaken baby syndrome without a finding of retinal hemorrhages if there is a report that the baby was in fact shaken. He said that a diagram prepared by Dr. Carpenter and Dr. Erlich at trial showed that there was extensive fresh bleeding to the brain, which was not depicted in the neuropathologist's photographs of Etzel's brain. The neuropathologist's photographs were the basis for Dr. Siegler's conclusion that death was caused by old trauma.

Dr. Erlich was called by the defense. She repeated her testimony that there was both old and new blood in the subdural area of Etzel's brain. She believed the cause of death was direct damage to the brain. She agreed that retinal hemorrhaging is present in 70 to 85 percent of shaken infant syndrome cases.

Dr. William Goldie, a pediatric neurologist, testified

for the defense. He had spoken on survivors of shaken baby syndrome. He is not board certified in neuropathology, clinical pathology, or in forensic pathology. He testified that death from shaken baby syndrome is due to either massive swelling of the brain or massive bleeding to the brain. He also testified that the fact that Etzel had jaundice, a heart murmur, and low birth weight were factors to make an infant more disposed to dying from SIDS. He concluded that the pathologists had not been able to determine the cause of Etzel's death. He believed that some of the bleeding in the brain could be attributed to the resuscitation efforts. His conclusion was that Etzel died from SIDS.

The expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusion that Etzel died from shaken baby syndrome. The conviction is supported by substantial evidence.

B

Appellant also challenges the sufficiency of the evidence that she had Etzel in her care and custody within the meaning of section 273ab. That statute states: "Any person who, *having the care or custody of a child* who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life."[3]

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3. The version of section 273ab in effect at the time of this offense provided for a sentence of 15 years to life. It was amended to provide for the 25 years to life term in 1996. (Stats. 1996, ch.

Here there is ample evidence that Etzel was under appellant's care and custody at the time he was injured. Appellant was the only adult in the living room with Etzel. She cared for him when he woke earlier in the night, and she picked him up and examined him when she noticed that he was not well. This is sufficient to satisfy the care and custody element of the offense.

II

Appellant contends the trial court engaged in a pattern of disparagement of her trial counsel that resulted in the deprivation of her Sixth Amendment right to the effective assistance of counsel and her Fourteenth Amendment right to a fair trial.

"A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel . . . and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense . . . .' [Citations.]" (*People* v. *Fudge* (1994) 7 Cal.4th 1075, 1107.) The Attorney General argues that appellant failed to preserve this issue by objecting or requesting that the jury be admonished. We agree that appellant was required to object or to seek an admonishment to preserve the issue for appeal. (*Id.* at p. 1108.) As the following discussion points out, counsel did so in some instances, but not in all. We shall, in any event, examine each instance raised by appellant.

460, § 2.)

A

"'An Hour's Opening Statement.'"

The prosecutor's opening statement is reported in 16 pages of reporter's transcript. During the defense opening statement, when defense counsel was discussing the complicated medical evidence which we have summarized, the trial court said: "Mr. Eriye why don't you quit at that point. You have been going for an hour. My reporter is about to run out of paper and I told the jury, who has not had a recess, that we would recess at 3:30 today." Mr. Eriye responded that he would conclude in five minutes. The trial court said that defense counsel would be given an additional five minutes, after the reporter had put in new paper. After defense counsel had resumed his statement, with no sign of concluding, the trial court interrupted and said: "All right. I am going to recess. An hour's opening statement. And I am afraid that five minutes won't do it." At that point, the defense opening statement was reported in 21 pages of reporter's transcript. The jury was admonished and excused at 3:35 p.m. The following morning, defense counsel concluded his opening statement, which is reflected in another five pages of reporter's transcript.

Appellant argues that the trial court's comment "made defense counsel appear to be so out of line with common practice that he was incompetent. This suggestion was discourteous and disparaging."

We disagree. It would have been better to have done this at sidebar, but misconduct is not shown. The trial court was merely exercising its power to control the trial. (*People* v. *Fudge*, *supra*, 7 Cal.4th at p. 1108.)

B

"'That's not the legal definition.'"

Near the conclusion of defense counsel's opening statement, he said: "So ladies and gentlemen of the jury, I thank you very much for giving me the time to hear. And I believe strongly that the experts and all the witnesses will clearly establish beyond a shadow of a doubt that--" At that point, the court interrupted and said "That's not the legal definition. It is beyond a reasonable doubt."

Appellant argues that the comment was inappropriate because defense counsel was not obligated to provide the legal definition of reasonable doubt. She contends: "Defense counsel was fully entitled to argue that he would prove beyond a shadow of a doubt that his client was innocent, even though that would be far more proof than necessary to acquit the defendant."

We find no error. The trial court was within its discretion in ensuring that the jury was not confused by the defense counsel's use of a standard different from reasonable doubt.

C

Favoritism Toward the Prosecutor

Appellant argues that the trial court allowed the prosecutor to harass Tomeka Smith (the mother of the child), who testified as a defense witness. The issue in the colloquy cited was what Tomeka had told police officers about the incident, and whether she told them the truth to the best of her recollection. Appellant asserts that defense counsel was cut off when he challenged a police officer with making up a story about Tomeka's statement to him.

This is the colloquy at issue:

"[Defense Counsel]: Now, at the commencement of your testimony you started with a story of what Tomeka told you. You're trying to make up a story, correct?

"[The Prosecutor]: Your honor, we are going to object to that. It is argumentative and it is insulting to this officer and it is unnecessary."

The trial court sustained the objection. We find no error. This was the fourth question asked by defense counsel in his cross-examination of this officer. Defense counsel had not raised any question about the veracity of the officer's account through inconsistencies or memory lapses. In contrast, during the prosecutor's examination of Tomeka, which is cited by appellant, Tomeka repeatedly said that she was unable to remember what she had said to the police. Under these circumstances, the trial court was not showing preferential treatment to the prosecution.

D

"'I Won't Hear Your Argument.'"

Before Dr. Carpenter began his testimony for the prosecution, counsel for the defense (outside the presence of the jury), objected to some of the diagrams the prosecutor planned to use with Dr. Carpenter. He said that some of the diagrams related to shaken baby syndrome and that there had been no evidence yet that Etzel had been shaken. The trial court said that it presumed that the diagrams would become relevant with the doctor's testimony, and that it did not understand how the defense could object until Dr. Carpenter had testified. The trial court said: "If he testifies and his testimony, for example, doesn't cover

that one you're referring to, then it won't be received in evidence. But I don't know until I have heard his testimony."

The prosecutor said that Dr. Carpenter was going to say that what was depicted on the diagram is one of the ways in which infant whiplash shake injury syndrome occurs. The trial court ascertained that the prosecutor planned to use the diagram to assist the jurors in following Dr. Carpenter's testimony. The trial court asked how the coroner [Dr. Carpenter] was going to testify about shaken baby syndrome. The prosecutor interrupted the court and said that Dr. Carpenter is an expert on shaken baby death. Defense counsel objected and said that Dr. Carpenter is not an expert, that he is a pathologist. The trial court said: "I don't know if it is true or not. But we will find out from his testimony. If he isn't I won't allow it in. If she establishes that he is an expert, it will probably be received. [¶] So let's see how the testimony goes before I rule on that."

After this colloquy, Dr. Carpenter testified to his credentials, including the fact that he is a board certified forensic, anatomic, and clinical pathologist. He also testified that he believed that the bleeding on the top of Etzel's brain was caused by violent shaking, which caused a whiplash action of his head. He testified in detail about how shaking a baby can cause death.

After this testimony was given, the prosecutor started to use a chart, which was marked as People's 12. Apparently this is the same diagram to which defense counsel had objected earlier, because he renewed his objection. The trial court said: "Counsel, I won't hear your argument. Isn't this something we took up outside

the presence of the jury? I think it is." The prosecutor said: "Yes, it is, Your Honor."

Appellant fails to cite or quote the remainder of the record on this point. In it, the prosecutor went on to lay additional foundation regarding Dr. Carpenter's expertise in the area of shaken infant syndrome before using the chart. After these foundational questions were answered, the prosecutor asked the trial court if it was satisfied. The trial court said yes, and offered counsel for appellant an opportunity to voir dire Dr. Carpenter on his experience with shaken infant syndrome. After defense counsel had asked Dr. Carpenter several questions regarding his qualifications, he asked a substantive question regarding how long it would take a child to die from shaking and how this would be manifested. At that point, the trial court interrupted counsel and said that this question was beyond the scope of proper voir dire and should be reserved for cross-examination. The trial court ruled that Dr. Carpenter was qualified and allowed the prosecutor to use the diagram in her continued examination.

There was no disparagement of counsel. The trial court properly allowed counsel for the defense to voir dire Dr. Carpenter about the subject matter of the diagram and found that Dr. Carpenter was qualified to testify as an expert witness.

E

"'Counsel, Just Don't Get Lost.'"

During cross-examination of Dr. Carpenter, defense counsel asked a series of questions relating to differences between Dr. Carpenter's trial and

preliminary hearing testimony. Defense counsel then asked a series of questions regarding a statement made by Dr. Carpenter to an investigator for the defense. Counsel asked if Dr. Carpenter told the investigator that he had found the bruise on Etzel's head before the autopsy began (this was contrary to Dr. Carpenter's trial testimony). Dr. Carpenter said that he had not said that. He explained: "He [the investigator] asked me what was my memory. I told him my memory, and my memory was that I had found the abrasion at the beginning of the autopsy. [¶] And I had alerted Dr. Erlich that something might be going wrong with this case and that I had stayed there. [¶] But that was not an accurate memory. As Dr. Erlich when asked her memory had a different one, plus she had . . . documentation as to which memory was correct."

Defense counsel then said: "I am a little bit lost here. What you're referring to memory--" The trial court interrupted and said: "Counsel, just don't get lost. He's answered the question. Ask another question."

Appellant argues that the trial court's statement was harsh and unprovoked. We disagree. The trial court was properly exercising its discretion to control proceedings. (*People* v. *Fudge*, *supra*, 7 Cal.4th at p. 1108.)

F

"'Counsel, I will make the rulings, not you.'"

During the direct examination of Dr. Erlich, counsel for the defense objected to a question on the ground that it misstated the evidence. The prosecutor said: "I will restate the question. I don't know if that misstates the testimony or not, but I will restate the question, Your Honor." Counsel for appellant interjected: "It does." The trial court said: "Counsel, I will make the rulings, not you."

Appellant argues that the trial court could have admonished the prosecutor, but only criticized defense counsel. The trial court properly admonished defense counsel. His comment was inappropriate.

G

"'Counsel, keep your comments to yourself.'"

Detective Michelle Robinson of the Los Angeles Police Department testified that she and Detective Nancy Nelson interviewed appellant. A hearing pursuant to Evidence Code section 402 was conducted to determine whether the tape recording of appellant's statement should be excluded because she was not admonished under *Miranda* v. *Arizona* (1966) 384 U.S. 436. The attorneys argued their positions and the trial court ruled that the tape was admissible. Counsel for appellant expressed a concern that portions of the tape recording were not reflected in the written transcript. The trial court said that the jury would be admonished to listen to the recording and would not be given the written transcript.

Before the tape was played to the jury, the trial court told defense counsel that if he had any specific

objections to portions of the tape, he should make sure that the portions were excised. The trial court also told counsel for defense to object if he heard a statement on the tape that is not in the written transcript. The trial court said that the jury would be admonished that the transcript was an aid to assist them, but that the tape is the actual testimony, and that the tape would be allowed in the jury room.

The following morning, counsel for the defense asked for a sidebar before the tape of appellant's statement was played to the jury. At sidebar, the trial court noted that it had been "inundated from notes from jurors they are having a time problem . . . ." Counsel for the defense strongly objected to the playing of the tape. He asserted that a substantial portion of the tape had been omitted from the written transcript. The trial court indicated that the jury would not be allowed to use the written transcript. The prosecutor objected, saying that she had asked counsel weeks before to give her his version of the transcript so the two could be incorporated. Counsel for defense stated that the prosecutor had given him an updated transcript only the day before toward the end of the court session. The trial court told counsel for the defense to furnish the transcript. It said that the jury would be admonished that the transcript was an assist, and that they might receive a second transcript, and would be asked to determine which was correct.

The trial court admonished the jury not to read ahead in the transcript, that defense counsel disagrees with the transcription and has a right to prepare a version which he believes is correct, and that it would be up to the jury to decide what the tape said. The trial

court told counsel that if he disagreed with a portion of the transcript, he could object and the tape would be stopped and the detective would be asked if she recalled what was said in the interview. Counsel for the defense said that this procedure was "fine."

After the tape was played, counsel for the defense objected on the grounds of Evidence Code sections 350, 352, 930 and 940. The trial court overruled the objections. In the presence of the jury, after both defense counsel and the prosecutor continued to discuss the tape, the trial court said: "Counsel, keep your comments to yourself. We have taken up proceedings outside the presence of the jury and you know better than that."

Later, during another colloquy at the bench, the trial court said: "[Y]our objections to 930 and 940 we addressed I believe yesterday. It is not a violation of her privilege against self-incrimination and it's clearly admissible."

In her brief, appellant argues that her counsel's comments were proper, and that he was following the court's direction to raise objections as the relevant portion of the tape was being played. We disagree. The Evidence Code objections made by counsel went to the entire tape, rather than to specific portions. The trial court had heard extensive argument following the Evidence Code section 402 hearing on the admissibility of the recording. Counsel should have raised these arguments at that time. The trial court was properly controlling the course of the trial, particularly in light of the jury's concerns about the length of the trial.

H

"'Counsel you had her leaving . . . .'"

During his examination of Rene Townsend, defense counsel asked a series of questions about the social worker's visit to the apartment, and her departure with the children. After several questions about the social worker's departure, counsel for the defense began to ask another question in this area. The trial court interrupted and said: "Counsel you had her leaving for the last 10 minutes. Would you move onto something relevant." The trial court had sustained a number of objections to questions regarding the relevance of the social worker's removal of the other children from the Townsend apartment.

While the trial court's language reveals some impatience, the court was correct that this line of questioning was not relevant. We find neither error nor prejudice.

I

Comment Regarding Examination of Ms. Townsend

Appellant complains that at the conclusion of his direct examination of Ms. Townsend, the trial court said: "One final question and then--you have had her on the witness stand for an hour." We observe that this admonition came after the trial court sustained the prosecution's objections to a series of questions by the defense regarding Ms. Townsend's opinion as to whether appellant would harm the baby. The trial court acted within its authority to control the trial in making its comment to defense counsel.

J

The Daily News Article

As we have noted, the defense recalled Dr. Erlich in

its case. During his questioning of this witness, counsel attempted to use an article from the Daily News newspaper. The trial court indicated that it did not seem relevant, but asked to see the article. The prosecutor objected to the article on the grounds of relevance and hearsay. The trial court then sustained the prosecution's objections. It stated that the use of the article is "totally improper" and would not hear argument on it.

The article was not marked as an exhibit, and we do not have a copy of it in the record. Appellant argues that the trial court should not have said that it was "totally improper." Even if the trial court's comment was too harsh, we see no prejudice.

K

Limitations on Defense Examination

Appellant argues that the trial court improperly cut off questioning of Dr. Erlich about the amount of blood present during the autopsy, and how she kept her notes clean. The trial court precluded counsel for the defense from redirect on the subject of Dr. Erlich's statements to the police because this was not within the scope of cross-examination. The ruling appears to be correct. Even if the questions could be regarded as within the scope, it is not likely that it prejudiced the result of the trial.

L

Unfairly Sustained Objections

Appellant argues that the trial court improperly sustained objections to his examination, while granting wider latitude to the prosecution. We have reviewed the instances cited and find no error or improper disparagement. We conclude that appellant was given

a fair trial.

We note that the trial court subjected the prosecutor to similar treatment.

III

Appellant argues that the trial court improperly required a greater showing to qualify the defense doctors as expert witnesses than it did to qualify the prosecutor's experts. We disagree.

We have already discussed Dr. Carpenter's qualifications as a board certified forensic, anatomic, and clinical pathologist. These qualifications were sufficient to establish his expertise.

Appellant argues that Dr. Goldie should not have been subjected to such extensive voir dire on his qualifications. On voir dire, the prosecutor established that he was not board certified in pathology, neuropathology, clinical pathology, or forensic pathology. He had worked in neuropathology only as a resident. In light of this testimony, more intensive voir dire of Dr. Goldie regarding his expertise on brain trauma to children was appropriate.

IV

Appellant argues that she was denied her right to a fair trial because of the cumulative errors she raised in her brief. We have found no error. Therefore, the argument cannot prevail.

V

Respondent asks this court to modify the judgment because the trial court failed to impose the mandatory

parole revocation fine pursuant to section 1202.45.[4] Section 1202.45 requires the court to impose a fine in the same amount as that imposed under section 1202.4. We agree that the failure to impose the fine renders the sentence unauthorized. (See *People* v. *Scott* (1994) 9 Cal.4th 331, 354.) Appellant was ordered to pay a restitution fine of $1,000 under section 1202.4, subdivision (8). In the interest of judicial economy, we impose the parole revocation fine rather than remand the case to the trial court. (*People* v. *Hong* (1998) 64 Cal.App.4th 1071, 1084; *People* v. *Walker* (1991) 54 Cal.3d 1013, 1029.)

We modify the judgment to reflect the additional fine of $1,000 required by section 1202.45. That fine is suspended unless and until appellant's parole is revoked.

DISPOSITION

The judgment is modified to impose and suspend a $1,000 parole revocation fine under section 1202.45. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS. EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.DAU, J.*

*Assigned by the Chairperson of the Judicial Council.

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4. The issues of whether the failure of a trial court to impose a mandatory fine can be addressed on appeal when it was not raised during trial, and whether an appellate court can impose the minimum fine rather than remand the case to the trial court, are currently under consideration by the Supreme Court. (See *People* v. *Baltazar* (S075450); *People* v. *Parker* (S077360); *People* v. *Tillman* (S077360).)